

Advice Memorandum

¹ All dates are 2002 unless otherwise indicated.

The \$34,000 box of information

The parties began negotiating for a new collective-bargaining agreement on January 7. In negotiation sessions on January 15 and 16, the Union made verbal and written information requests. Those requests included information on workers' compensation, pension, health and safety, and other economic issues that the Union believed related to contract negotiations. Human Resources Manager Stephen Buckley responded that the requests were "excessive and voluminous," and that it would take "working around the clock to produce the information requested." International Representative Matt Snell stated that he did not care, and that the Employer was required by law to provide the information. Buckley demanded that the Union give him "all the information requests now" so the parties could proceed to other matters before the collective-bargaining agreement expired.

On January 21, during a negotiation session, Snell demanded the requested information and threatened to file unfair labor practice charges against the Employer if he did not receive the information. Buckley informed Snell that the information requests were voluminous and the Employer was incurring significant costs in compiling the information, including contracting with its corporate benefits center and an outside actuarial firm. Buckley requested that the Union bargain about the costs of information and Snell refused to do so. Buckley stated that the Employer would provide the information, as requested, but expected the Union to bargain over the costs of supplying the information.

On January 22, Buckley again informed the Union that responding to the information requests would be costly, but Snell stated he would not bargain until he received the requested information. On January 23, the parties cancelled negotiations to allow for compilation of the information. By close of business that day, the Employer presented the Union with a box containing most of the requested information.

On January 26, Snell informed the Employer's bargaining representatives that he intended to request further information. When Buckley again requested bargaining over the costs of supplying the information, Snell replied that he would not bargain "anything" until he had the information; that he would bargain about costs only if required by law.

During the January 29 bargaining session, Buckley again raised the subject of bargaining over the costs of the

information provided. The Union refused to discuss the matter. During negotiations the following day, Snell said that the Union would pay only for paper and computer disks. Buckley wrote on a blackboard how the Employer calculated the costs of the information provided on January 23, listing the number of hours each of the Employer's departments spent on the Union's information request, at a rate of \$98.57 an hour. The Employer charged more than \$18,000 for its "inside" services. In addition, he listed various contractors who had spent time on the request, at the rate of \$100.00 per hour, plus the use of an actuarial firm at a cost of more than \$12,000. The costs totaled \$34,500, and the parties began to refer to the information provided as the "\$34,000 box." Buckley proposed that the parties split those costs and that the Union pay \$17,000.

At a bargaining session the following day, Snell asked for another breakdown of the costs of the \$34,000 box, and Buckley complied as before. Buckley again asked to negotiate costs, and Snell refused. At the January 31 bargaining session, Snell stated that the Union was obliged only to pay reasonable costs and refused to discuss the matter further.

On February 20, Snell asked whether the Employer was still interested in bargaining the costs of information, but did not offer any proposal when Buckley asked for one. During the February 22 negotiation session, Snell once again asked for a breakdown of the costs of the \$34,000 box, including the names of the employees who worked on the requests, the hours they did so, and the employees' respective wage rates. Snell also asked for the name of contact persons at any outside contractors that worked on the Union's information requests; Buckley repeated the breakdown previously given. Buckley advised the Union representatives that their information requests were costly and voluminous, but the Union refused to bargain about the costs.²

² On April 29, the Union engaged in a strike, which ended on May 13. In Case 14-CA-26902, filed May 2, the Region determined that the strike was an economic strike and dismissed all the Union's allegations related to bad faith bargaining. That case is currently pending before the Office of Appeals. In that case, the Union also charged the Employer with violating the Act by demanding \$34,000 from the Union for compiling information in January that the Union had requested, when it gave the Union no advance notice of those costs.

Additional information requests

On May 24, the Union wrote to the Employer requesting various information on new hires and unit employees.

On May 29, Buckley, while responding to a Union information request dated May 6, regarding employees with work restrictions (the subject of Case 14-CA-26966), asked that the Union bargain over the costs of producing the \$34,000 box. Union Bargaining Chair Steve Rockers responded by letter the next day, writing that the Union's position on negotiating costs of information "remains the same as discussed in negotiations." By letter dated May 31, Buckley replied that the Union had made extensive, burdensome information requests that required significant research and demanded that the Union bargain about the costs.³

By letter dated June 10, the Union stated that it would "negotiate reasonable costs of copies" of information requested in its May 6 and May 24 letters. By letter dated August 9, Buckley wrote to the Union stating, "I want to remind you that the Union has not yet agreed to bargain with the Company concerning the voluminous and burdensome information requests which you have continued to serve on the Company since January 2002." On August 12, the Union offered dates on which to meet and bargain about the costs of the information.

On August 20, the parties met and Snell stated that the Union could not afford the Employer's rates for gathering information and offered to bring in other international

³ On May 31, the Employer filed a charge in Case 14-CB-9588(1-2), alleging among other things, that the Union failed to bargain in good faith regarding the costs of information of the "\$34,000 box" provided in January. While the Union initially stated it did not have to bargain over the information costs, the Union then stated it was willing to bargain over the costs of the information and the Region dismissed that charge on grounds of non-effectuation. That case is also pending before the Office of Appeals.

Case 14-CA-26966(1-2), filed by the Union on June 5, was dismissed and is similarly pending before the Office of Appeals. That case, however, does not deal with the \$34,000 box, rather it alleges that the Employer refused to provide information in response to a May 6 request. The Employer replied that the request was burdensome, and that a confidentiality agreement and cost sharing had to be worked out. The parties met to bargain over confidentiality and the costs of responding to that information request.

representatives to review company records. The Employer rejected the suggestion that the international representatives have access to company records but countered that the bargaining committee could gather the information. Buckley then provided the Union with a memorandum showing that the Employer had spent over \$66,000 in responding to the Union's information requests since the beginning of negotiations, and that amount did not include preparation of financial information for the Union's review. Buckley stated that the Employer would continue to propose a 50/50 split, and that the Union's costs were about \$33,000. Buckley asked if the Union was ready to bargain about costs, and Snell said he would not bargain.

In the August 21 bargaining session, the Employer again asked whether the Union was ready to bargain the costs of information, and Snell, while admitting an obligation to bargain costs, made no proposals and moved on to other subjects.

In the August 27 negotiation session, the parties discussed the Employer's proposal for billable rates, but the Union made no offer. Snell asked for another cost breakdown, admitting that he had a copy of the previously-provided breakdown at the Union hall but could not find it. The Employer again provided the same cost information it had repeatedly provided.

On September 9, Union Bargaining Chair Rockers met with Manager Buckley and Labor Relations Manager Susan McAdams, without the presence of International Representative Snell, regarding a May 24 information request for transfer documents and employment applications. The Employer said that the information was computerized and difficult to retrieve. The Employer again asked whether the Union was willing to bargain over the costs of retrieving the information. Rockers replied that the Local could not pay the costs and said he could not bargain costs because he was not the financial person. On the following day, Rockers, by letter, offered to bargain the reasonable costs of copies but stated that the census information, which the Union received in July and again requested in August, should be provided without cost.

On September 17, the Employer repeated its position that the Union's information requests were voluminous, burdensome, and repetitive, and gave as an example the Union's August 27 request for information concerning bargaining unit employees that the Employer had supplied. The Employer again asked the Union to bargain over the costs of the information. On September 25, the Union responded and demanded access to the information and stated it would

make its own copies with a portable photocopier, and demanded that the Employer respond to its demands by the following day.

At the September 27 bargaining session, Buckley again raised the issue of bargaining over the costs of information. Snell claimed that he had not been told about the \$34,000 box. Snell then announced that the UAW had a policy of not paying for information and he certainly would not be the first to do so. Snell added that the Union could not afford to pay the costs and he would not agree to pay. Snell told the Employer that it was refusing to supply information and he would not bargain about costs.

The parties continued to exchange correspondence regarding the issue of information requests and the Union's obligation to bargain. On October 10 Snell told Buckley that he would bargain about the costs. Buckley requested a proposal from Snell, but Snell stated that the Union had no money to pay the costs of information. Snell attempted to raise other issues and Buckley proposed that the Union pay \$25,000 of the \$66,000 in information costs accumulated thus far. Snell replied that those costs were unreasonable, and Buckley responded that the costs were unreasonable only because the information requests had been unreasonable.

By letter dated October 16, International Representative Snell informed the Employer that the Union would bargain the costs of information but wanted access to the data and records to secure its desired information. The Employer replied that it would not allow a union representative access to its computer systems.

At the November 6 bargaining session, Buckley again raised the costs of the information. Buckley reviewed the history of the Employer's requests that the Union bargain over the costs of the information. Snell rejected the Employer's offer of \$25,000 for its portion of the information costs, and Buckley then withdrew this offer and returned to the 50/50 split of the \$66,000 in information costs.

On November 7, the parties reached an agreement on allocating the costs of responding to the Union's request for information on transfer forms. The Employer estimated, by its standard rates, that the cost of providing this information was \$138. After the Employer stated that the information could be provided in a simpler form, the Union agreed to pay \$100. However, the Employer informed the Union that it expected to continue to negotiate on the costs of any voluminous and burdensome information requests.

ACTION

We conclude that the Union did not violate Section 8(b)(3) by refusing to bargain over the cost of supplying information. Rather, the Employer, by providing the information before giving the Union an effective opportunity to bargain over the costs, prevented good faith bargaining from taking place. Although the Employer may have a legitimate claim that compliance with the Union's information request was burdensome, that is appropriately raised as an affirmative defense to an 8(a)(5) refusal to provide information allegation. It is not relevant in determining whether the Union committed an 8(b)(3) violation. Accordingly, absent withdrawal, the Region should dismiss the charge.

The Act requires bargaining over terms and conditions of employment. The Board and courts recognize that relevant information enables good faith bargaining.⁴ Therefore, information must be supplied as an aid to bargaining over those mandatory subjects.

Here, the Employer, despite its concern about costs, supplied the Union with almost all relevant information without first specifying the amount of costs it was incurring or obtaining the Union's commitment to bargain over apportioning those costs.⁵ By providing the information, then demanding that the Union pay its share, the Employer prevented the Union from proposing other options and bargaining intelligently. For example, had the Union known just how costly compliance with its requests was going to be for the Employer, the Union could have proposed that it have access to the information to compile the information itself or it could have determined that it could go forward without all of the requested information. In these circumstances, where the Union was presented with a fait accompli that reduced its bargaining options, we

⁴ NLRB v. John Swift Co., 302 F.2d 342, 346 (2d Cir. 1962); Int'l Paper Co., 319 NLRB 1253, 1348 (1995).

⁵ The facts undermine any argument that the Union consented to bargain over costs before the Employer provided the information. Although the Employer asserts that it told Union representative Snell that it would compile the information with the expectation that the Union would bargain about costs, the Union did not agree to that proposal. Rather, the Union demanded that the Employer supply the information because it was relevant to performing its representative duties and threatened to file unfair labor practice charges should the Employer not produce it.

conclude that the Union did not violate the Act by refusing to bargain over apportioning costs that the Employer had already incurred.

This appears fully consistent with the Board's directive in Food Employers Council,⁶ that, "[i]f there are substantial costs involved in compiling the information in the precise form and at the intervals requested by the [u]nion, the parties must bargain in good faith as to who should bear such costs. . . ." There, unlike here, the issue presented was whether an employer's refusal to supply information was excusable, in whole or in part, because of the burdensomeness of the union's information request. In those circumstances, if the Board determines that all or part of the unprovided information was truly burdensome, and the union is unwilling to bear all or a portion of the costs of compiling the information, the Board could relieve the employer of its obligation to supply the burdensome information.⁷ Here, by contrast, because the Employer already has turned over the information, the Board could not restore status quo ante conditions that would permit good faith bargaining over information costs to take place. Nor is it clear that, absent an agreement between the parties on apportioning costs, the Board could order an apportionment of costs without running afoul of Section 8(d).⁸

Furthermore, although the Employer may have legitimate concerns about the expense it incurred in complying with the Union's information requests, that is not relevant to determining whether the Union committed an 8(b)(3) violation by refusing to bargain about the costs of the information. Rather, that claim is appropriately raised as an affirmative defense to an 8(a)(5) complaint alleging a refusal to supply information. The Board requires that the claim be raised with the union in a timely manner and that the employer provide substantiation for its claim.⁹ As the Board has

⁶ Food Employers Council, Inc., 197 NLRB 651 (1972).

⁷ See United Aircraft Corp., 192 NLRB 382, 389-90 (1971), where the Board provided for such relief. See also Greensboro News and Record, Inc., 290 NLRB 219, 233 (1988) (and cases cited therein) (same).

⁸ See H.K. Porter Co. v. NLRB, 397 U.S. 99, 106 (1970).

⁹ See AK Steel Corp., 324 NLRB 173, 184 (1997) ("if an employer declines to supply relevant information on the grounds that doing so would be unduly burdensome, the employer must not only seasonably raise this objection with the union but must substantiate its defense"), quoting, A-Plus Roofing, 295 NLRB 967, 972 (1989). Accord Westside

stated in the context of an employer's assertion of confidentiality claims, an "employer 'cannot simply raise its . . . concerns, but must also come forward with some offer to accommodate both its concerns and its bargaining obligation.'"¹⁰

Accordingly, we conclude that the Union violated no duty to bargain about the costs of its information requests.¹¹ Absent withdrawal, the Region should dismiss the charge.

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Community Mental Health Center, Inc., 327 NLRB 661, 674 (1999).

¹⁰ Detroit Newspaper Agency, 317 NLRB 1071, 1072 (1995), quoting, Tritac Corp., 286 NLRB 522 (1987). See also A-Plus Roofing, 295 NLRB at 972; AK Steel Corp., 324 NLRB at 184.

¹¹ Given the foregoing analysis, it is unnecessary to decide whether, under other circumstances, bargaining over the costs of providing information would be a mandatory or permissive subject.